

Judiciary Working Group
Tuesday, July 28, 2020

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The State Board of Education is certainly aware of the liability issue for our institutions and schools, but the State Board has not yet taken a formal position on possible COVID-19 limitation of liability. The comments that follow are my own, based on input from staff.

Public higher education institutions, school districts and charter schools are working to safely offer in-person instruction.

- A committee assembled by the Governor, including members from his office, legislators, the Board of Education, the Department of Education, school administrators, and Central District Health developed a framework for the reopening of Idaho Schools which was made available at the end of June. It provides several strategies and considerations to establish expectations and provide guidance to school districts and charter schools based on levels of community spread. It does not provide legal advice.
- Our public higher education institutions have each created plans for delivery of instruction this fall. Nearly all institutions will require faculty, staff and students to wear face masks on campus. Some institutions will require COVID-19 testing for students. Most institutions will transition to remote learning after Thanksgiving for the balance of the fall semester. In-person classes will be held in rooms suitable to achieve appropriate physical distancing.
- Institutions and schools face some unique risks:
 - Higher education institutions with on-campus housing.
 - Ensuring physical distancing for in-person classroom instruction.
 - Ensuring compliance with applicable on-campus requirements for face masks, physical distancing, handwashing and additional sanitation requirements for facilities.
- Even if plans for in-person instruction at schools (based on the category of community transmission as determined by the public health district) and CDC guidance are followed, there likely is no way to completely prevent the transmission of the virus. Of course institutions and schools have no control over other aspects of community spread.
- If the legislature concludes that legislation limiting liability from damages resulting from COVID-19 is warranted, it would seem reasonable to provide that protection to the institutions and schools (public and private) that have followed their plans to limit transmission.

- Areas for coverage of limited liability
 - Exposure to COVID-19; Contracting COVID-19
 - Students
 - Employees
 - Other members of the public
 - Implementation of responsive actions
 - Mitigation steps
 - Masks, thermal imaging, physical distancing, etc.
 - Testing mandates and participation in testing processes
 - Quarantine/Isolation mandates
 - Move to distance delivery – cancellation of in person classes and events
 - HR or contracting claims against schools. Service contracts with vendors (including transportation) and personnel contracts.
- Terms for coverage/liability limitations
 - All claims for loss, personal injury, damages (contract and tort) arising from operations during the COVID-19 pandemic, including mitigation steps as well as actual operations
 - To run as long as mitigation efforts remain necessary and exposure risk continues
- Reasonable exceptions to liability limitations
 - Willful misconduct
 - willful failure to follow Idaho health authority mandates/directives or governor's mandates/directives
 - Gross negligence
 - Include a rebuttable presumption that acts reasonably necessary for opening for business and acts thereafter reasonably necessary for maintaining business operations are not negligent.
- Time is of the essence if the legislature concludes additional liability limitations are needed.
 - Risk of claims for opening will begin in earnest with the return of students to campus.
 - We will learn much in the first semester, including what worked and what did not.
 - The need is for clear limits to liability before the semester begins or as soon after beginning as feasible.
 - Can a law passed dissolve claims that may have already accrued, such as exposure to COVID-19 or loss due to mitigation efforts?